

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHANNON ALVERTA HADLEY,

Defendant-Appellant.

---

UNPUBLISHED

May 10, 2005

No. 253514

Wayne Circuit Court

LC No. 03-001403-01

Before: Meter, P.J., and Bandstra and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions for armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to twelve to twenty years in prison for the armed robbery conviction, to run consecutive to two years in prison for the felony-firearm conviction. We affirm.

Defendant first argues that he was denied his right to due process and a fair trial when the trial court denied his motion to suppress the victim's identification of him at the preliminary examination, because it was unduly suggestive and there was no independent basis for the victim's in-court identification of him at trial. An identification procedure that is unnecessarily suggestive and conducive to irreparable misidentification constitutes a denial of due process. *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). In order to challenge an identification on the lack of due process, a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification. *Id.* If the trial court finds that the procedure was impermissibly suggestive, evidence concerning the identification is inadmissible at trial unless an independent basis for in-court identification can be established that is untainted by the suggestive pretrial procedure. *Id.* at 542-543.

We review de novo a trial court's ultimate decision regarding a motion to suppress. *People v Davis*, 250 Mich App 357, 362; 649 NW2d 94 (2002). However, we review a trial court's findings of fact from a suppression hearing for clear error. *Id.* A finding of fact is clearly erroneous if, after a review of the entire record, we are left with the definite and firm conviction that a mistake has been made. *Id.*

There is no per se rule that all in-court identifications at preliminary examinations are impermissibly suggestive. *People v Fuqua*, 146 Mich App 133, 143; 379 NW2d 396 (1985), overruled in part on other grounds in *People v Heflin*, 434 Mich 482, 498; 456 NW2d 10 (1990); *People v Johnson*, 58 Mich App 347, 353; 227 NW2d 337 (1975). Instead, we examine the totality of the circumstances to determine whether the victim's identification of defendant at the preliminary examination was unduly suggestive. *People v McElhaney*, 215 Mich App 269, 287; 545 NW2d 18 (1996).

Here, the victim had the opportunity to observe defendant at close proximity during the robbery. Additionally, the victim explained that he failed to positively identify defendant at the live lineup because he believed that the perpetrator would be wearing the same clothing that he was wearing during the incident. The victim positively identified defendant at the preliminary examination, less than one month after the incident. Moreover, the victim explained that when he was robbed, the perpetrator had his head down, and had the hood of his jacket cinched around his face so that only the part of his face from the top of his eyebrows to his moustache was in view. The victim then explained that at the preliminary examination, defendant's head was tilted down, and it was at that point that he recognized defendant as the perpetrator. The victim confirmed that before the preliminary examination he was not told that the perpetrator would be in court, and that he did not identify defendant as the perpetrator solely because defendant was with an attorney.

Contrary to defendant's assertion on appeal, we find that the instant case is distinguishable from *People v Solomon*, 47 Mich App 208, 216-221; 209 NW2d 257 (1973) (Lesinski, C.J., dissenting), adopted at 391 Mich 767; 214 NW2d 60 (1974). In *Solomon*, the identifying eyewitness was told by the police before the preliminary examination that "they had the guy," and the preliminary examination did not occur until two and a half years after the incident. *Solomon*, *supra* at 211-212. In this case, however, the victim was not told before the preliminary examination that the perpetrator would be in court, and the preliminary examination occurred less than one month after the incident. Under the totality of the circumstances, defendant's right to due process was not violated by the victim's identification of him at the preliminary examination. *McElhaney*, *supra* at 287.

Because there was no impropriety in the victim's pretrial identification of defendant at the preliminary examination, there was no need to establish an independent basis for an identification. *Id.* at 288. We find that the trial court did not clearly err in its determination that the victim's pretrial identification of defendant at the preliminary examination was not tainted by improper procedure and was not unduly suggestive. *Id.* at 286. Because defendant was unable to show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification, the trial court properly denied defendant's motion to suppress. *Davis*, *supra* at 362; *Williams*, *supra* at 542.<sup>1</sup>

---

<sup>1</sup> We note that despite the trial court's determination that defendant had not met his burden of showing that the victim's pretrial identification of him at the preliminary examination was impermissibly suggestive, the trial court urged defense counsel to use the victim's inability to identify defendant at the lineup to support a mistaken identity defense at trial. And at trial, (continued...)

Defendant next argues that there was insufficient evidence to sustain his conviction for armed robbery.<sup>2</sup> Specifically, defendant challenges the sufficiency of the evidence regarding his identity as the robber. “[A] challenge to the sufficiency of the evidence at a bench trial is reviewed by considering the evidence presented in a light most favorable to the prosecution and determining whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.” *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988).

Identity is always an essential element in a criminal prosecution, *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976), and the prosecutor must identify the accused as the person who committed the alleged offense. *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967). “Identity may be shown by either direct testimony or circumstantial evidence which gives the [trier of fact] an abiding conviction to a moral certainty that the accused was the perpetrator of the offense.” *Id.* Defendant argues that the evidence presented at trial concerning his identity as the robber was insufficient because the victim was unable to identify him at the live lineup, and because of discrepancies between the testimony of the victim and Sergeant Odell Godbold, who witnessed the robbery.

Here, the victim testified that after defendant robbed him at a carwash, defendant threw the victim’s car keys near a dumpster, and ordered the victim to start walking away from the scene out to the main street. When the victim reached the middle of the street he saw defendant turn and start walking down the back side of the carwash. At that point, the victim heard a commotion near the corner and heard someone say “we got him.” Sgt. Godbold testified that he witnessed the entire robbery, and pursued defendant from the moment he left the victim to the moment he was apprehended. Godbold maintained that he never lost sight of defendant. Defendant, on the other hand, testified that he was urinating near the corner at the time he was arrested.

On appeal, defendant posits that the identity of the perpetrator was not proven beyond a reasonable doubt because of the discrepancy between the testimony of the victim and Godbold. That is, defendant argues that he could not have been the perpetrator if the victim could see the perpetrator at the same time he heard a commotion—Godbold apprehending defendant near the corner. However, the prosecution argued in closing that the commotion the victim heard was likely the arrest of defendant’s friend, Donyell Woods.

Defendant also takes issue with alleged discrepancies between the descriptions of the perpetrator’s clothing given by the victim and Godbold. The victim testified that the perpetrator was wearing a white or light colored hooded jacket with dark patches on the sleeves. Godbold

---

(...continued)

defense counsel cross-examined the victim concerning his inability to identify defendant at the lineup.

<sup>2</sup> We note initially that the prosecution presented evidence supporting each element of armed robbery—an assault and felonious taking of property from the victim by the defendant who is armed with a dangerous weapon. *People v Lee*, 243 Mich App 163, 168; 622 NW2d 71 (2000). Here, the victim testified that defendant pointed a chrome-plated pistol at him and took his wallet, which contained twelve dollars.

testified that defendant was wearing a black and white jogging suit at the time of his arrest. Defendant testified that he was wearing jogging pants and a t-shirt at the time of his arrest; the matching jacket, which was black and white striped, was recovered from Woods' car.

The trial court noted that this case came down to the issues of identification and credibility. In making its determination that defendant was guilty of the charged offenses, the trial court noted that it found Godbold to be a credible witness and assigned particular weight to Godbold's testimony that he observed the entire incident and did not lose sight of defendant from the time of the robbery until the time defendant was apprehended. The trial court noted that Godbold's testimony corroborated the victim's account of the incident, and specifically commented on the similarity in details with which both witnesses described the incident. The trial court also found the description of the perpetrator's clothing given by the victim and Godbold to be largely consistent. The trial court commented that it did not find defendant to be a credible witness, and disbelieved defendant's testimony that he was merely urinating at the time of his arrest and was only wearing a t-shirt outside in late December.

The trial court, sitting as trier of fact, was entitled to judge the credibility of the witnesses and determine the weight to give to the evidence. *People v Marji*, 180 Mich App 525, 542; 447 NW2d 835 (1989). Although there appears to be some question concerning how the victim had the perpetrator in sight at the time he heard a commotion—which could have been the apprehension of either defendant or his friend—the trial court was satisfied that defendant was the perpetrator on the basis of Godbold's testimony that he did not lose sight of defendant from the time of the robbery until the time he was apprehended. Moreover, we will not interfere with the trier of fact's role of determining the weight of the evidence or deciding the credibility of the witnesses, and all conflicts in the evidence must be resolved in favor of the prosecution. *People v Fletcher*, 260 Mich App 531, 561-562; 679 NW2d 127 (2004). Therefore, we conclude that the evidence presented in this case was sufficient to support defendant's convictions.

Defendant next argues that he was denied his right to due process and a fair trial when the prosecution failed to provide defense counsel with the results of fingerprint analysis of the alleged robbery weapon. Whether defendant was denied his due process right to information is a question of law, which we review de novo on appeal. See *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998). However, because defendant failed to raise the issue below, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A criminal defendant has a due process right to obtain exculpatory evidence possessed by the prosecutor if it would raise a reasonable doubt as to the defendant's guilt. *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994), citing *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998).

Here, the record reveals that before trial, in response to defendant's motion for additional discovery, the parties stipulated to, and the trial court subsequently ordered, a fingerprint analysis

of the alleged robbery weapon. The trial court also ordered that defense counsel be provided with a report of the results of the analysis. However, the record of the final pretrial conference reveals that at that time, defense counsel had not yet received such information. The prosecutor indicated on the record that he would make an inquiry and convey his findings to defense counsel. However, there is no further reference in the lower court record to fingerprint analysis being performed and/or the results of any such analysis. As a result, defendant is unable to prove that the prosecutor possessed any fingerprint evidence, let alone evidence that was favorable to him. Consequently, defendant is unable to establish a *Brady* violation. Defendant has failed to demonstrate plain error; therefore, he is not entitled to relief on this unpreserved issue.

Defendant alternatively argues that defense counsel was ineffective for failing to obtain the fingerprint analysis results; however, as noted above, it is unclear whether such an analysis was ever performed. A claim of ineffective assistance of counsel cannot be predicated on the failure to procure evidence which does not exist and which has not been shown to have any potential to affect the outcome of the trial; therefore, defendant is not entitled to relief on this issue. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

Defendant next argues that his due process right to a fair trial was violated where the prosecutor elicited testimony from a police officer that while on surveillance around the time and near the location of the incident, she saw a vehicle that matched the description of a vehicle that had been involved in an earlier armed robbery. However, we are unable to discern whether defendant is arguing that the prosecutor engaged in misconduct by eliciting the allegedly inadmissible evidence, or whether the trial court abused its discretion in allowing such evidence contrary to MRE 404(b). “It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.” *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) (citations omitted). This constitutes abandonment of the issue. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).

However, even if defendant had not abandoned this issue, he is not entitled to relief. At trial, the prosecutor examined a police officer concerning the reason she was conducting surveillance around the time and near the location of the incident. The police officer testified that while on surveillance, her attention was drawn to a white vehicle with tinted windows, and that she had been on the lookout for a vehicle matching that description because it had been linked to an earlier armed robbery. Defense counsel objected on the basis of hearsay and relevance. The trial court overruled the objection, and held that the police officer’s testimony was not hearsay because it was not offered to prove the truth of the matter asserted. MRE 801, 802. Rather, the testimony was offered to explain what the police officer was doing in the area and the reason why that particular vehicle caught her attention.

We agree with the trial court that the police officer’s testimony was relevant evidence under MRE 401 and 402, and did not constitute inadmissible hearsay under MRE 801 and 802. Further, while defendant now argues that the evidence was inadmissible under MRE 404(b) as evidence of a prior bad act, it is well settled that “an objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground.” *Id.* Moreover, evidence that a vehicle matching the description of a vehicle used in an earlier armed robbery was present

around the time and near the scene of the incident simply does not constitute evidence of any prior crime, wrong, or act under MRE 404(b). No plain error occurred in the admission of such evidence, and defendant is not entitled to relief on this unpreserved issue. MRE 103(d).

Defendant next argues that he was denied the effective assistance of counsel at trial. Because defendant failed to move for a new trial and we have not remanded for a *Ginther*<sup>3</sup> hearing, our review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

“Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *People v Solomonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). “In order to overcome this presumption, defendant must first show that counsel’s performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms.” *Id.* “Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel’s unprofessional errors the trial outcome would have been different.” *Id.* at 663-664.

Defendant argues that defense counsel was ineffective for failing to adequately investigate the case. When claiming ineffective assistance because of counsel’s alleged unpreparedness, a defendant must show prejudice resulting from the alleged lack of preparation. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). However, defendant fails to demonstrate that additional investigation would likely have yielded exculpatory information, and how the absence of that information prejudiced his defense to a strong case presented by the prosecution. Defendant has failed to show that defense counsel’s performance fell below an objective standard of reasonableness; therefore, he is not entitled to relief on this issue.

We affirm.

/s/ Patrick M. Meter  
/s/ Richard A. Bandstra  
/s/ Stephen L. Borrello

---

<sup>3</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).